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## SUBJECT INDEX


PAGE

Statement of case ..... 1

Argument ..... 3

I.

A contingent contract in California is valid, and for wrongful discharge respondents are entitled to recover the compensation specified by the terms of such contract of employment.. 3

II.

Petitioners, under California law, cannot complain because the verdict was less than the respondents were entitled to..... 4

III.

Under no possible construction could the action of the respondents against the petitioners in the California courts be construed to be an action in quantum meruit..... 6

IV.

The decision of the Appellate Court that the first action was res judicata as to the present action is supported by California authorities ..... 9

V.

The Superior Court correctly determined the case on the merits and the District Court of Appeal properly affirmed the same, and there is no constitutional question..... 11

Conclusion ..... 14

## TABLE OF AUTHORITIES CITED


| CASES | PAGE |
|---|---|
| Andrews v. Reidy, 7 Cal. (2d) 366 | 9 |
| Archibald v. Schultz, 14 Cal. App. (2d) 320 | 6 |
| Babcock v. Olhasso, 109 Cal. App. 534 | 6 |
| Baroni v. Musick, 3 Cal. App. (2d) 419 | 6 |
| California C. F. Corp. v. Provision Co., Inc., 119 Cal. App. 738 | 6 |
| Crocker-Huffman Land and Water Co. v. Goss, 203 Cal. 233 | 5 |
| DeHart v. Allen, 26 Cal. (2d) 829 | 9 |
| Del Barrio v. Sherman, 16 Cal. App. (2d) 407 | 6 |
| Denio v. City of Huntington Beach, 22 Cal. (2d) 580, 140 P. (2d) 392 | 2, 3, 11 |
| English v. English, 9 Cal. (2d) 358 | 9 |
| Guitron v. Rodriquez, 105 Cal. App. 513 | 5 |
| Harris v. Kessler, 124 Cal. App. 299 | 8 |
| Hays v. Temple, 23 Cal. App. (2d) 690 | 7, 8 |
| Heiser v. Woodruff, 90 L. Ed., Adv. Ops. 828 | 10 |
| Manuel v. Calistoga Vineyard Co., 17 Cal. App. (2d) 377 | 6 |
| McClung v. Moore, 138 Cal. 181 | 4, 5 |
| McPherson v. Milling Co., 44 Cal. App. 491 | 6 |
| Orfanos v. California Insurance Company, 29 Cal. App. (2d) 75 | 6 |
| Orloff v. Metropolitan Trust Co., 17 Cal. (2d) 484 | 8 |
| Payne v. Commercial National Bank of Los Angeles, 177 Cal. 68 | 6 |
| Price v. Sixth District Agricultural Assn., 201 Cal. 502 | 9 |
| Roloff v. Hundeby, 105 Cal. App. 645 | 6 |
| Sanderson v. Neiman, 17 Cal. (2d) 563 | 9 |
| Sutphin v. Speik, 15 Cal. (2d) 195 | 9 |

| TEXTBOOKS. | |
|---|---|
| 17 California Jurisprudence, Sec. 14, p. 618 | 7 |
| 6 Corpus Juris, Sec. 336, p. 755 | 7 |
| 7 Corpus Juris Secundum, Sec. 197, p. 1104 | 7 |

IN THE

# Supreme Court of the United States

October Term, 1946.
No. 559.

THE CITY OF HUNTINGTON BEACH, a municipal corporation,

*Petitioner,*

*vs.*

E. C. DENIO, G. A. HART, G. P. TAUBMAN, JR., and M. C. SIMPSON, partners, under the firm name and style of DENIO, HART, TAUBMAN AND SIMPSON,

*Respondents.*

**Respondents' Brief in Opposition to Granting of the Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.**

*To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

## Statement of Case.

Respondents respectfully submit that this is a case brought by attorneys at law, all of whom are residents of the State of California, against a California municipality for attorneys' fees under a contingent fee contract made and to be performed in California. This case was tried

before a jury demanded by the defendant and the jury rendered a verdict in favor of the plaintiffs. The defendant appealed and the case was affirmed by the Supreme Court of California. (*Denio v. City of Huntington Beach*, 22 Cal. (2d) 580, 140 P. (2d) 392. [Tr. of Rec. p. 96.]

The judgment in this case was accepted as final by the petitioners. The present action was then instituted for another installment of fees under the contingent contract, the plaintiffs setting up the fact that the former judgment was *res judicata*, and that is the only question involved here, and is purely a question for the state courts. This issue was tried by the Superior Court and a decision and judgment rendered in favor of respondents. [Tr. of Rec. pp. 27 to 37, incl.] On appeal. the judgment of the Superior Court was affirmed. [Tr. of Rec. p. 70.] A hearing was denied by the Supreme Court. [Tr. of Rec. p. 96.] Both the decisions of the Supreme Court and the District Court of Appeal of the State of California followed well-established principles of California law, and we submit that no Federal question or question under the Federal Constitution is involved in this action.

## ARGUMENT.

### I.

### A Contingent Contract in California Is Valid, and for Wrongful Discharge Respondents Are Entitled to Recover the Compensation Specified by the Terms of Such Contract of Employment.

This point is completely determined by the decision of the Supreme Court in *Denio v. Huntington Beach*, 22 Cal. (2d) 580; [Tr. of Rec. pp. 96, 107];

> "We conclude that the contract of employment here involved is valid, and binding upon defendant city, and that for the breach of that contract by defendant, *i. e.*, the discharge of plaintiffs if such discharge was wrongful, plaintiffs are, under the long-established rule in California, entitled to recover the compensation specified by the terms of such contract of employment. (See *Baldwin v. Bennett* (1854), 4 Cal. 392; *Cole v. Superior Court* (1883), 63 Cal. 86, 88 (49 Am. Rep. 78); *Webb v. Trescony* (1888), 76 Cal. 621, 623 (18 P. 796); *Bartlett v. Odd Fellows Savings Bank* (1889), 79 Cal. 218 (21 P. 743, 12 Am. St. Rep. 139); *Carter v. Baldwin* (1892), 95 Cal. 475 (30 P. 595); *Kirk v. Culley* (1927), 202 Cal. 501, 506 (261 P. 994); *Elconin v. Yalen* (1929), 208 Cal. 546, 549 (282 P. 791); *Zurich G. A. & L. Ins. Co. Ltd. v. Kinsler* (1938), 12 Cal. 2d 98, 100-101 (81 P. 2d 913); *Echlin v. Superior Court* (1939), 13 Cal. 2d 368, 375 (90 P. 2d) 63, (fol. 110), 124 A. L. R. 719); *Countryman v. California Trona Co.* (1917), 35 Cal. App. 728, 736 (170 P. 1069); *McCully v. Gano* (1931), 116 Cal. App. 695, 698-699 (3 P. 2d 348); *Green v. Sherritt* (1936), 17 Cal. App. 2d 732, 736-737 (62 P. 2d 769).)" [Tr. of Rec. p. 107.]

In the first action it was the contention of petitioner herein that the defendant abandoned their contract and that therefore their discharge was not wrongful. This is completely answered by the decision of the Supreme Court in which the evidence is fully set out. [Tr. of Rec. p. 108.]

## II.

## Petitioners, Under California Law, Cannot Complain Because the Verdict Was Less Than the Respondents Were Entitled To.

Petitioners complain that because the verdict in the first suit was $2000.00 when under the evidence respondents should have been entitled to $2794.09, that therefore the judgment in the first case could not be *res judicata*, and that by so applying the judgment they are deprived of their property without due process of law. The Supreme Court of California passed upon this question in the first appeal when they state in their opinion:

> "The fact that the verdict rendered awards plaintiffs less than they might be entitled to recover does not prejudice defendant." [Tr. of Rec. p. 115.]

This is in direct accordance with prior decisions of the Supreme Court of California. In *McClung v. Moore*, 138 Cal. 181, 182, the Supreme Court of California says:

> "The jury disregarded the instruction as to the amount of its verdict, thereby giving plaintiff a verdict for $2,223.77 less than he should have had under the express agreement. While the plaintiff might have appealed and claimed that the verdict was injurious to him by being for less than he was entitled to under the agreement, it cannot be claimed by defendant that the error committed by the jury injured

him. He does not contend that the evidence would not have supported a verdict for the full amount claimed by plaintiff. If it would support a verdict for $2,988.50, it supports the verdict for $764.73. The greater includes the less."

*McClung v. Moore,* 138 Cal. 181, 182.

In *Guitron v. Rodriquez,* 105 Cal. App. 513, 515, the Appellate Court of the State of California says:

"It is also argued that the verdict cannot be justified because under the provisions of section 3310 of the Civil Code the full contract price is the measure of the detriment caused by the breach of a buyer's agreement to accept and pay for personal property whereas in this action the jury awarded the plaintiffs no more than $1000. If the point were raised by the plaintiffs we might be constrained to give it some consideration, but we cannot perceive how the defendants can possibly be prejudiced through a verdict of $1,000 instead of $2,700."

*Guitron v. Rodriquez,* 105 Cal. App. 513, 515.

In *Crocker-Huffman Land and Water Co. v. Goss,* 203 Cal. 233, the Supreme Court of California says:

"The balance alleged and found to be due being $74.88 less than the amount actually due as shown by the evidence, and the difference being in appellant's favor, the latter has no ground of complaint by reason of said inaccuracy."

*Crocker-Huffman Land and Water Co. v. Goss,* 203 Cal. 233, 235.

To the same effect are the following California cases:

*Archibald v. Schultz,* 14 Cal. App. (2d) 320;

*Orfanos v. California Insurance Company,* 29 Cal. App. (2d) 75;

*Del Barrio v. Sherman,* 16 Cal. App. (2d) 407;

*Payne v. Commercial National Bank of Los Angeles;* 177 Cal. 68.

*Baroni v. Musick,* 3 Cal. App. (2d) 419;

*Manuel v. Calistoga Vineyard Co.,* 17 Cal. App. (2d) 377;

*Babcock v. Olhasso,* 109 Cal. App. 534, 536;

*California C. F. Corp. v. Provision Co., Inc.,* 119 Cal. App. 738, 740;

*Roloff v. Hundeby,* 105 Cal. App. 645, 653;

*McPherson v. Milling Co.,* 44 Cal. App. 491, 494.

## III.

## Under No Possible Construction Could the Action of the Respondents Against the Petitioners in the California Courts Be Construed to Be an Action in Quantum Meruit.

Petitioners argued at great length that the verdict of the jury must have been based upon the second cause of action in plaintiff's complaint which is on the common count of money had and received, and that therefore the verdict of the jury must have been for only the reasonable value of services. We respectfully submit that this action was on an express contract and that the cause of action for money had and received is not an action in *quantum meruit.* The Supreme Court of California in its decision determines that the action was upon the express contract.

[Tr. of Rec. p. 99 *et seq.*] The first cause of action of the complaint was entirely upon the contract. [Tr. of Rec. p. 1.] The second cause of action is purely for a cause of action for money had and received. [Tr. of Rec. p. 9.] Referring to money had and received it is stated in 17 *Cal. Jur.*, Section 14, page 618, as follows:

> "It will lie to recover money collected by the defendant which belongs to the plaintiff but has not been paid over to him; money received and held by the defendants as trustees for the plaintiff. . . ."
>
> 17 *Cal. Jur.*, Sec. 14, p. 618.

6 *Corpus Juris*, Section 336, page 755:

> "Where moneys to which the attorney is equitably entitled have come into the hands of the client, the former may sue as for money had and received."
>
> 6 *Corpus Juris*, Sec. 336, p. 755.

See, also:

> 7 *Corpus Juris Secundum*, Sec. 197, p. 1104.

As a matter of pleading in California, if the facts are stated in one cause of action and another cause of action merely sets forth the common count of money had and received, both must be considered together. The Court says in *Hays v. Temple*, 23 Cal. App. (2d) 690:

> "As to the third count, which was a common count for money had and received, the demurrer was likewise properly sustained. It is the established law of California that ,if plaintiff is not entitled to recover under one count in a complaint wherein all the facts

upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count. (*Harris v. Kessler,* 124 Cal. App. 299, 303 (12 Pac. (2d) 467); *Powers v. Freeland,* 114 Cal. App. 146, 150 (299 Pac. 736).)"

*Hayes v. Temple,* 23 Cal. App. (2d) 690.

In *Harris v. Kessler,* 124 Cal. App. 299, 303, the Court says:

"Nor do we find any ground for reversal because of the order of the court sustaining the demurrer to the second count in the cross-complaint without leave to amend. It was a common count for money had and received, the demand being for $16,636.92, which was the identical amount claimed under the first count, and manifestly was based on the same state of facts set forth in the first count. It follows, therefore, that if defendant was not entitled to recovery under the first count, wherein all of the facts upon which the demand was based were specifically pleaded, he was not entitled to recover the same under a common count."

*Harris v. Kessler,* 124 Cal. App. 299, 303.

See, also:

*Hays v. Temple,* 23 Cal. App. (2d) 690, 695;

*Orloff v. Metropolitan Trust Co.,* 17 Cal. (2d) 484, 489.

## IV.

## The Decision of the Appellate Court That the First Action Was Res Judicata as to the Present Action Is Supported by California Authorities.

". . . When an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto."

*Price v. Sixth District Agricultural Assn.*, 201 Cal. 502, 511;

*Andrews v. Reidy*, 7 Cal. (2d) 366;

*Sutphin v. Speik*, 15 Cal. (2d) 195;

*DeHart v. Allen*, 26 Cal. (2d) 829.

The reason for the rule is stated in *Sutphin v. Speik, supra*, as follows:

"A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable."

*Sutphin v. Speik*, 15 Cal. (2d) 195, 202.

There have been only two exceptions to this rule in California modern decisions. *English v. English*, 9 Cal. (2d) 358, determines that the rule does not apply to default judgments, and *Sanderson v. Neiman*, 17 Cal. (2d) 563, determines that the rule does not apply to judgments of the

small claims court because of the informal procedure in that court. It is interesting to note that this rule is in accordance with the latest expression of the Supreme Court of the United States:

> "In general a judgment is *res judicata* not only to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."
>
> *Heiser v. Woodruff*, 90 L. Ed., Advance Opinions 828, 834.

The case at bar is simply an action for the recovery of another installment under the same contract which was litigated and found valid and binding upon the petitioner in its first cause of action. The Appellate Court, in the decision attacked in the case at bar, states as follows:

> "It would be inconsistent in this case to admit evidence and to permit a decision which would have the effect of destroying a contract for compensation, the validity and binding effect of which, and the right to recover compensation under which, was specifically upheld in the former action." [Tr. of Rec. p. 75.]
>
> "The basic facts and the existence of the obligation here sued upon have been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action." [Tr. of Rec. p. 77.]

V.

**The Superior Court Correctly Determined the Case on the Merits and the District Court of Appeal Properly Affirmed the Same, and There Is No Constitutional Question.**

Petitioners at great length set out excerpts from the testimony in the first case to show that they should have won. Their argument was properly made before the jury which did not believe their theory. The Supreme Court affirmed the first case. We shall not burden this court by setting out the facts of the first case. Suffice to say that it was an action for attorneys' fees on a contingent contract; that there was ample evidence to show that the contract had been performed by the respondents and that the respondents continued at all times ready, willing and able to continue performance; that respondents were discharged wrongfully and without cause; that petitioners set up a general denial, abandonment of the contract, invalidity of the contract and the constitutional question as to the ability of the City to enter into the contract, all of which were resolved against respondents by the jury and affirmed by the Supreme Court. (*Denio v. City of Huntington Beach,* 22 Cal. (2d) 580.) [Tr. of Rec. p. 96.] A fair résumé of the facts by a court and not a partisan résumé of these facts by any party are set out in the opinion of the Supreme Court in the first case and are found in the copy of the opinion set out in the *Transcript of Record* commencing with the first paragraph on page 100 and extending to the end of the first paragraph on

page 107. This statement of the case on the merits was adopted by the Appellate Court of the State of California, Fourth Appellate District, which opinion is set forth in full commencing with page 71 of the *Transcript of Record.* The court states in the opinion as follows:

> "This action involves the same contract and the same general facts as those in *Denio v. City of Huntington Beach,* 22 Cal. (2d) 580. The facts are rather fully stated in the opinion in that case and need not be repeated here." [Tr. of Rec. p. 71.]

In the first case the Supreme Court tersely resolved the merits in favor of respondents when it said:

> "As was stated by the District Court of Appeal in *Pacific Finance Corp. v. City of Lynwood, supra* (at pp. 518-519 of 114 Cal. App.): '. . . we know of no reason why a city, as well as an individual, should not be expected to keep faith with those with whom it contracts, or else respond in damages for its failure." [Tr. of Rec. p. 107.]

The Appellate Court further disposes of the constitutional questions in its opinion, basing the same upon the verdict of the jury in the first case and the determination of the Supreme Court in that case, that the contract was a valid one for compensation for services. The Appellate Court on the constitutional questions endeavored to be raised, states as follows:

> "Some contention is made that constitutional questions were raised in this action which were not raised

or considered in the former action, in that it was here attempted to raise the issue that compensation for services not actually performed is tantamount to a gift and that exemplary damages may not be awarded against a municipality. Not only could these questions have been raised in the former action (*Andrews v. Reidy*, 7 Cal. (2d) 366), but in view of the judicial determination that this was an enforceable contract for compensation for services no question of gift or exemplary damages is here involved." [Tr. of Rec. p. 78.]

It is interesting to note that while the decision in the first case by the Supreme Court was by a 4 to 3 majority, yet in the case at bar there was no dissent to the order denying a hearing in the Supreme Court after decision of the District Court of Appeal;

"In the Supreme Court of California in Bank.

Denio, *et al.* v. The City of Huntington Beach.

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Appellant's petition for hearing denied.

Dated, Jul. 2, 1946.

GIBSON, Chief Justice."

[Tr. of Rec. p. 96.]

## Conclusion.

In view of the fact that this is simply an action for compensation by California attorneys at law against a California municipality, made, executed and to be performed in the State of California; that the case has been fully and fairly decided and in accordance with a long line of California decisions, and that there is neither a federal or constitutional question involved, we submit and earnestly urge that the Petition for a Writ of Certiorari be denied by the Supreme Court of the United States.

Respectfully submitted,

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